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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1935~~

No. 78

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

COLEMAN-GILBERT ASSOCIATES

No. 79

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

COLEMAN-GILBERT ASSOCIATES

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MAY 27, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 78

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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1 [Caption omitted.]

Before United States Board of Tax Appeals

Docket No. 51557

COLEMAN-GILBERT ASSOCIATES, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances

For Petitioner: Henry Herrick Bond, Esq., Ralph E. Tibbetts, Esq.

For Respondent: C. A. Ray, Esq.

Docket entries

Transferred to Mr. Murdock, 12/8/33.

1930

Dec. 23—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 23—Copy of petition served on General Counsel.

1931

Jan. 17—Answer filed by General Counsel.

Jan. 26—Copy served, assigned General Calendar.

2 1932

Oct. 11—Hearing set November 17, 1932.

Oct. 20—Motion to transfer to the Boston, Mass., Circuit Calendar filed by taxpayer. 10/22/32 granted.

1933

Apr. 26—Notice of appearance of Ralph E. Tibbetts as counsel filed.

June 7—Notice of hearing at Boston, Mass., be[illegible]ng July 10, 1933.

July 13—Hearing had before Mr. Smith—submitted. Stipulation of facts filed. Petitioner's brief due in 60 days—respondent's due in 60 days. (Called 7/10/33.)

Aug. 7—Transcript of hearing 7/13/33 filed.

Sept. 2—Brief filed by taxpayer.

1934

June 1—Memorandum opinion rendered—J. E. Murdock, Division 3. Decision will be entered for respondent.

June 4—Decision entered—J. E. Murdock, Division 8.

Aug. 30—Petition for review by U. S. Circuit Court of Appeals, 1st Circuit, with assignments of error filed by taxpayer.

Sept. 1—Proof of service filed by taxpayer.

Sept. 26—Agreed statement of evidence lodged.

Sept. 27—Agreed statement of evidence approved and ordered filed.

Oct. 8—Praecipe filed.

Oct. 8—Proof of service filed.

Oct. 27—Order enlarging time for transmission and delivery of record to Nov. 15, 1934, entered.

Before U. S. Board of Tax Appeals

Petition

Filed December 23, 1930

(IT:AR:B-3 CEO-60D)

The above petitioner hereby petitions for a redetermination of deficiencies set forth by the Commissioner of Internal Revenue in his notice of final determination dated November 6, 1930, and as a basis of this proceeding alleges as follows:

3 (1) The petitioner, Colman-Gilbert Associates, is a trust organized by law and having its principal place of business in Boston, Mass.

(2) Notice of deficiency, a copy of which is attached and marked "Exhibit A", was mailed to the petitioner on November 6, 1930.

(3) The taxes in controversy are the income taxes for the calendar years 1927 and 1928, the amounts of said deficiencies being as follows:

For 1927	$10,975.78
For 1928	9,327.66
Total	20,303.44

(4) The determination of taxes set forth in said notice of deficiency is based upon the following errors:

(a) Said deficiencies are not due under a proper construction of the Revenue Acts of 1926 and 1928 and amendments thereto and regulations relative thereto.

(b) The Commissioner has erred in taxing your petitioner as an association under said acts, your petitioner being, if it exists at all, a Massachusetts trust, so called, and not taxable under said acts.

(c) The Commissioner has erred in taxing your petitioner as an association under said acts for the further reason that by the execution of the trust instrument hereinafter referred to and attached hereto as "Exhibit B" the legal and equitable interests in certain real estate were vested in the same persons, and said interests, under the laws of the Commonwealth of Massachusetts, thereupon merged, thereby depriving your petitioner of all title in and to the property the income of which is alleged to be the income of your petitioner.

(5) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Prior to November 5, 1926, Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine were tenants-in-common of certain parcels of real estate located in the city of Boston. These properties were suitable for rental and were handled by the five individuals as a joint venture, being operated as a single unit in the nature of a partnership undertaking. The interest
4 of Bernard Gilbert in the properties was two-sixths, and that of each of the others above named was one-sixth.

(b) On November 5, 1926, the five individuals undertook to put the said properties into a trust by an instrument in writing, constituting themselves the "Coleman-Gilbert Associates", and taking legal title to such property into their own names as trustees. Their respective beneficial interests in said properties remained as before, and the so-called "trust" continued to conserve said properties, collect rents, and distribute the net proceeds in the same manner as before the formation of said trust, all net returns being divided among the trustees according to their respective beneficial interests, and the procedure of handling the properties after the formation of the trust was identical with that previously followed. The same books of account were kept continuously and the same character of entries made. None of the individuals before the formation of the trust or subsequent to it received any remuneration for services or were in any other way compensated other than to receive his or her respective share in the net proceeds.

(c) The trust instrument purported to limit the liability of the trustees to the trust property and by its terms precluded the possibility of any of the beneficial interests, who were also the trustees, from seeking a subdivision of the property under the provisions of the laws of the Commonwealth of Massachusetts, and it was for this purpose that the said trust was formed. No certificates of stock were issued to the beneficial owners. Certain provisions as to investment and reinvestment were inserted in the trust instrument as a precautionary measure, but were purely incidental and in aid of the conservation of the property originally put into the trust and as an aid to the liquidation of said property, and not with the idea and purpose of permitting the carrying on of a general real-estate business for speculative purposes or otherwise.

Wherefore your petitioner prays that this Board may hear the proceeding and determine that no deficiencies exist for said years.

Respectfully submitted.

HENRY HERRICK BOND,
Counsel for Petitioner,
10 Post Office Square, Boston, Mass.

5 [*Duly sworn to by Harry Coleman et al. Jurat omitted in printing.*]

NP–2–26–28

Exhibit A to petition

TREASURY DEPARTMENT,
Washington, Nov. 6, 1930.

COLEMAN AND GILBERT ASSOCIATES,
339 Huntington Avenue, Boston, Massachusetts.

SIRS: You are advised that the determination of your tax liability for the years 1927 and 1928 discloses a deficiency of $20,303.44 as shown in the statement attached.

In accordance with section 274 of the Revenue Act of 1926 and section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability for the years in which a deficiency is disclosed.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your returns by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET, *Commissioner.*
By J. C. WILMER, *Deputy Commissioner.*

Enclosures: Statement; Form 882; Form 870.

STATEMENT

IT:AR:B-3 CEO-60D

In re: Coleman and Gilbert Associates, 339 Huntington Avenue, Boston, Massachusetts.

Tax liability

Year	Corrected tax liability	Tax previously assessed	Deficiency
1927	$10,975.78	None	$10,975.78
1928	9,327.66	None	9,327.66
Total	20,303.44	None	20,303.44

Reference is made to office letter dated April 19, 1930, wherein you were advised that your organization was held to be taxable as an association as defined by articles 1502 and 1504 of Regulations 69 for 1927. Since the issuance of the above letter, the Bureau has given further careful consideration to the question at issue.

It has been determined that the beneficiaries of the trust are the trustees; and that the beneficiaries actually control the trustees. The trust is engaged in business in quasi-corporate form. Although the chief property of the trust is realty, the trust instrument provides that the interests of the beneficiaries shall be personalty, thereby changing the ordinary rule that obtains in strict trusts. The interests

of the beneficiaries are thus made to resemble those of stockholders in a corporation. The trustees under the terms of the trust instrument have discretion similar to that of directors of a corporation either to distribute income or to use it in developing or improving the corpus, whereas except for such provision, under the rule of strict trusts, they would be required to distribute income. The trust instrument expressly provides that there shall be no personal liability
7 on the part of either trustees or beneficiaries for debts of the trust. There is nothing in the trust instrument restricting the free assignability of the beneficial interests in the trust.

It also appears that the trustees are engaged in operating some twenty large apartment houses, and that under the terms of the present trust instrument the trustees may buy and sell real estate, or stocks or bonds, or other securities. Further there is nothing in the trust instrument to prevent the trustees from engaging in the business of dealing in real estate for the trust. While it is true that the life of the trust, under its terms, is set nominally at fifteen years, still the trustees have the power to transfer the assets to another trustee or trustees, or to a corporation, and no limit of time is set on such new trust or corporation, so that the trust assets might thus remain, if not in the present trust, then in another, or in a corporation with only such limitations as the beneficiaries might see fit to impose. Moreover, there is no evidence that the trustees ever tried to sell the property or did anything more than operate the apartment houses.

Based on the above facts, the Bureau concludes that Coleman and Gilbert Associates is taxable as an association, and accordingly your contention that the organization is a trust and the income thereof taxable to the beneficiaries is denied.

With respect to the year 1928, it does not appear that there has been any change in the declaration of trust. Accordingly the ruling for the year 1927 is equally applicable to 1928.

A copy of this letter has been mailed to your representative, Mr. Henry Herrick Bond, No. 73 Water Street, Boston, Massachusetts, in accordance with the authority conferred upon him in the power of attorney executed by you and on file with the Bureau.

Net income reported on return taxable at 13½%----------	$81,302.11
Tax liability----------	10,975.78
Tax previously assessed----------	None
Deficiency in tax----------	10,975.78

8 1928

Net income reported on return taxable at 12%----------	$77,702.53
Tax liability----------	9,327.66
Tax previously assessed----------	None
Deficiency----------	9,327.66

Exhibit B to petition

DECLARATION OF TRUST

This Declaration of Trust made this 8th day of November 1926, Witnesseth:

Whereas Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine, all of Brookline in the County of Norfolk and Commonwealth of Massachusetts, have conveyed to Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine by deed of even date to be recorded herewith certain real estate in the City of Boston, particularly described in said deed, reference to which is hereby made.

Now, therefore, we, the said Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine, do hereby declare that the real estate conveyed to us as aforesaid, and any real estate, or interest in real estate, hereafter acquired under this trust, is and shall be upon the trusts to the uses, for the purposes, and with the powers and limitations following:

First. That the trust shall be designated as the "Coleman-Gilbert Associates."

Second. That the trust shall terminate in fifteen years (15) from the date hereof, unless sooner terminated by sale and distribution of the trust estate, or otherwise, as hereinafter provided.

Third. The Trustees, their successor or successors, or the trustees hereunder for the time being hereinafter referred to as the "Trustees" shall hold said real estate and any real estate or interest therein hereafter acquired under this trust, subject to the provisions of this instrument in order to improve and dispose of the same for the benefit of the persons hereinafter named as cestuis que trustent
9 and beneficiaries, and their respective representatives and assigns, devisees, or legatees in the shares hereinafter provided.

Except as hereinafter set forth, the said cestuis que trustent or beneficiaries shall have no right or interest in the trust property itself from time to time held by said trustees, and especially they shall have no right to call for any partition thereof. The interests of said beneficiaries shall be personal property carrying the rights hereinafter set forth. The death of any or all of the said beneficiaries during the continuance of this trust shall not determine the trust nor entitle his or her legal representatives to an accounting by the trustees, nor to any suit or action at law or in equity against the trustees, but the executors, administrators, assigns, legatees, or devisees of the deceased beneficiary shall succeed to the rights of such decedent under this trust.

Fourth. (a) The trustees shall have as full power and discretion as if they were the absolute owners of said trust property, to invest and reinvest the trust property, including also income in mortgages, bonds, notes, or other obligations secured upon real estate, and in the purchase and improvement of real estate, and in the purchase and

improvement of real estate situated in the cities or towns of the Commonwealth of Massachusetts. All real estate or interest therein so purchased shall be conveyed to them as trustees hereunder.

(b) The trustees shall have full power and discretion as if absolute owners of said trust property, to sell, transfer, and convey from time to time at public or private sale any part of all of the trust property upon such terms and conditions as they shall see fit, and to invest the proceeds in the same manner and upon the same trusts as the original trust estate.

(c) Without in any manner limiting the powers of the trustees as hereinbefore provided in paragraph (b), it is expressly declared that said trustees shall have absolute control over and power to dispose of all real estate held by them at any time under this trust, including therein powers to sell and convey in fee simple or for any less estate free and discharged of all trusts, at public auction or by private sale, either for cash or upon credit or partly for cash and partly for credit, and to receive, assign, give partial releases from, or discharge any mortgage taken as part consideration for such sale or sales, to improve, to lease for a term beyond the possible termination of this trust or for any less term, to hire for improvement or otherwise, to let, to exchange, to release, to partition, and to make, execute, acknowledge, and deliver all necessary deeds, agreements, and other instruments relating to the trust estate.

(d) The trustees may borrow money for such time and upon such terms as they shall see fit, and may secure the payment of any money borrowed by mortgage or mortgages to be drawn either with or without a power of sale clause, and said trustees in their discretion may pledge as collateral security for any loan any mortgages, mortgage, leases, or lease forming part of the trust property. The trustees shall execute and deliver such notes or other evidences of indebtedness as may be necessary in the premises.

(e) The trustees shall have full power to cancel and discharge mortgages by deed or otherwise on payment or satisfaction thereof. The execution by the trustees of all contracts, of all conveyances and transfers, and of any and all other instruments relating to the trust property, or any part thereof, shall be deemed sufficient.

(f) At any time during the continuance of the trust the trustees may act and determine all questions hereunder, may make sales, borrow money, execute deeds, mortgages, and other instruments, and shall have and may exercise all and every power, right, interest, and discretion herein given or imposed upon said trustees.

No purchaser, lender, corporation, associates, or officer or transfer agent thereof dealing with trustees shall be bound to make any inquiry concerning the validity of any sale, pledge, mortgage, loan, or purchase purporting to be made by said trustees, nor be liable for the application of money paid or loaned to said trustees.

Fifth. Whenever said trustees shall have funds in their possession, the proceeds of sales or otherwise, or net income, not required in their

judgment for development or improvement of the trust property, they shall divide and pay over the same annually, or oftener, if convenient to said trustees, equally among the said beneficiaries and their respective representatives and assigns in the following proportions:

11 Harry Coleman, one-sixth; Pauline Coleman, one-sixth; Bernard Gilbert, two-sixths; Harris Levine, one-sixth; and Lena Levine, one-sixth.

But said trustees may in any case retain such an amount as they deem necessary for payment of debts and expenses of the trust whether due and payable or future and contingent.

Sixth. The trustees shall have no power to bind the beneficiaries personally, and in every written contract made by said trustees reference shall be made to this declaration of trust, and the person or persons or corporation so contracting or dealing with the trustees shall look only to the funds and property of the trust for payment under any contract, or for payment of any debt, damage, judgment or decree or of any money that may otherwise come due and payable by reason of the failure on the part of the trustees to perform such contract in whole or in part, and neither the trustees nor the beneficiaries, present or future, shall be personally liable therefor. Each trustee shall be responsible for his own wilful default and breach of trust, only, and shall not be responsible for honest error of judgment.

Seventh. The trustees and any trustee hereunder may resign his trust by written instrument signed and sealed by him and acknowledged in the manner prescribed for the acknowledgment of deeds, and such instrument shall be recorded in the Registry of Deeds for the County of Suffolk. In case of death or resignation of a trustee, the continuing or surviving trustee shall have power to appoint a co-trustee. An instrument recorded in Suffolk County Registry of Deeds signed by the continuing or surviving trustees certifying the appointment of their co-trustees, together with the acceptance of the trust by said new trustees, shall be conclusive evidence of the appointment of said new trustee. Each and every new trustee shall have the same powers, rights, and interest and be subject to the same duties touching the trust estate as the original trustees. In the event of the death of all of the trustees, or in the event that the office of trustee shall become vacant because of failure to appoint as above provided, the beneficiaries hereunder shall have the right to appoint a new trustee to act, and such appointment shall be signed, sealed, acknowledged as aforesaid, and together with the ac-

12 ceptance of this trust by the new trustee shall be recorded in said Suffolk County Registry of Deeds.

Eighth. The trustees may terminate this trust at any time by sale of the trust estate and division of the proceeds thereof among the said cestuis que trustent and beneficiaries and their respective representatives, assigns, legatees devisees, in the shares hereinbefore provided, being first duly indemnified for any outstanding obligation or liability, and shall thereupon be forthwith discharged. At

the expiration of said term of fifteen years, said trustees shall terminate this trust by sale and distribution of the proceeds among said beneficiaries and their respective representatives, assigns, legatees, or devisees, in the shares hereinbefore provided, to wit: Harry Coleman, one-sixth; Pauline Colman, one-sixth; Bernard Gilbert, two-sixths; Harry Levine, one-sixth; and Lena Levine, one-sixth, being first duly indemnified for any outstanding obligations or liability, and all powers herein given said trustees shall continue for the purpose of such sale and distribution of the proceeds. The trustees may alter (except that no such alteration shall extend the term of this trust beyond fifteen years from the date hereof) or add to this declaration, or terminate this trust, and if it seems to them judicious so to do, they may convey the trust fund to a new or other trustee or trustees, or to a corporation, being first duly indemnified for any outstanding obligation or liability. The instrument setting forth such alteration, addition, termination, or conveyance shall be executed by the trustees and acknowledged in the manner provided for acknowledgment of deeds and recorded in said Registry of Deeds. Any such instrument shall be conclusive of the existence of all facts and of compliance with all pre-requisites necessary to the validity or such alteration, addition, termination or conveyance, whether stated in such instrument or not, upon all questions as to title or affecting the rights of third persons.

Provided, however, and it is especially declared, that the trustees shall be under no obligation to terminate this trust or convey the trust fund, except as hereinbefore provided.

In witness whereof said trustees hereunto set their hands and seals on the eighth day of November 1926.

HARRY COLEMAN. [SEAL]

13

PAULINE COLEMAN [SEAL]
BERNARD GILBERT [SEAL]
HARRIS LEVINE [SEAL]
LENA LEVINE [SEAL]

Witness to all signatures:
DAVID LASKER.

And we, Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine, being the cestuis que trustent above referred to and the only persons beneficially interested in the property conveyed by said deed above referred to said Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine, trustees hereby signify our assent to and approval of the above declaration of trust.

HARRY COLEMAN.
PAULINE COLEMAN.
BERNARD GILBERT.
HARRIS LEVINE.
LENA LEVINE.

Witness to all signatures:
DAVID LASKER.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, *November 8, 1926.*

Then personally appeared the above-named Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine, and acknowledged the foregoing instrument to be their free act and deed, before me

DAVID LASKER, *Notary Public.*

My commission expires Sept. 28, 1928.

Before U. S. Board of Tax Appeals

Answer

Filed January 17, 1931

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(1) Admits the petitioner, Coleman-Gilbert Associates, has
14 its principal place of business in Boston, Massachusetts, and denies the remaining allegations of paragraph (1) of the petition.

(2) Admits the allegations contained in paragraph (2) of the petition.

(3) Admits the allegations contained in paragraph (3) of the petition.

(4) Denies that the respondent erred in the determination of the deficiency as alleged in paragraph (4) of the petition, subparagraphs (a), (b), and (c).

(5) (a), (b), and (c). Denies the allegations contained in subparagraphs (a), (b), and (c) of paragraph (5) of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that petitioner's appeal be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
C. A. RAY,
Special Attorney,
Bureau of Internal Revenue.

Before United States Board of Tax Appeals

GOLEMAN-GILBERT ASSOCIATES, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 51557, 62960

Ralph E. Tibbets, Esq., for the petitioner.
C. A. Ray, Esq., for the respondent.

Memorandum opinion

Entered June 1, 1934

MURDOCK: The Commissioner determined deficiencies as follows:

Docket No.	Year	Deficiency
51557	1927	$10,975.78
62960	1928	9,327.66
	1929	2,241.39

15 The Commissioner determined each of these deficiencies on the theory that the petitioner was an association taxable as a corporation in each of the years. The term "corporation" is defined in Section 2 (a) (2) of the Revenue Act of 1926 and in Section 701 (a) (2) of the Revenue Act of 1928 as including associations. The only issue in this case is whether or not this petitioner is an association and, therefore, taxable as a corporation under those two revenue acts. The parties filed a stipulation of facts as follows:

The petitioner was created November 8, 1926, under an indenture of trust. A copy of this indenture is attached hereto and made a part hereof, which copy may be accepted in all respects as if it were an original.

The creators of the trust Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine named themselves trustees of the petitioner and deeded certain land which they had held to the petitioner.

The property in question, consisting of some twenty apartment houses in the City of Boston and its suburbs, had originally been owned by Messrs. Gilbert, Coleman, and Levine, each owning a one-third interest, but subsequently Messrs. Coleman and Levine transferred one-half of their interest in this property to their wives, and, at the time of the petitioner's creation, Harry Coleman owned one-sixth interest in the property, Pauline Coleman one-sixth, Bernard Gilbert one-third, Harris Levine one-sixth, and Lena Levine one-sixth.

For the years 1927, 1928, and 1929 the petitioner filed returns with the Federal Government on Form 1041 reflecting the following incomes:

Year:	Income
1927	$81,302.11
19286	77,730.53
1929	23,376.23

The 1929 return, which is attached hereto and made a part hereof, is typical of the returns filed for all three years.

The trust owns and operates some twenty apartment houses in the City of Boston and its environs. The gross annual rents of these apartment houses amount to approximately $420,000. There are approximately 1,500 tenants in the apartment houses alto-
16 gether. The gross cost of the properties themselves is approximately $3,000,000. Employees' pay rolls total about $25,000 a year, the trustees draw no salary. The operating expenses run over $300,000 a year and are shown in detail in the returns which are made a part hereof. An office force of three persons, besides the three operating trustees, is required to keep the necessary financial records of the trust. Two of the male trustees devote their entire time to the management and operation of the trust properties. A third trustee, Mr. Levine, is also actively engaged in taking care of a portion of the management duty. There are no building managers or superintendents, the trustees doing all this work as part of their duties as trustees. They supervise the maintenance of the trust properties and see that they are kept in operating condition, collect the rents, order repairs, purchase supplies, arrange loan financing, borrow money when necessary, pay all expenses, supervise the office details involved in the operation of these properties, personally direct the work of all the personnel, secure new tenants, pacify old ones, in short, they devote their entire time, energy, and ability to the successful operation of the trust properties. The female trustees are entirely inactive in the management of the trust. No part of the management work, collection of income, etc., is performed by "agents", as that term is generally understood, except insofar as strictly supervised employees on a weekly salary might be considered agents.

The trust indenture, mentioned in the first paragraph of the stipulation, after reciting the conveyance of the real estate to the five persons by deed of even date, declares that this real estate and any further property acquired under the trust, is and shall be upon the trusts, to the uses, for the purposes, and with the powers and limitations described in eight numbered paragraphs of the declaration of the trust. The second paragraph is as follows:

"SECOND. That the trust shall terminate in fifteen years (15) from the date hereof, unless sooner terminated by sale and distribution of the trust estate, or otherwise, as hereinafter provided."

The provisions of the third paragraph are that the trustees
17 shall hold the real estate, subject to other provisions of the declaration, in order to improve and dispose of it for the

benefit of the persons named as beneficiaries, in the shares thereinafter provided, and they shall have no interest or right in the trust property itself and no right to call for any partition hereof. "The interests of said beneficiaries shall be personal property carrying the rights hereinafter set forth. The death of any or all of the said beneficiaries during the continuance of this trust shall not determine the trust nor entitle his or her legal representative to an accounting by the trustees, nor to any suit or action at law or in equity against the trustees", but the successor of any beneficiary shall succeed to the rights of such decedent under the trust. The trustees were given certain powers in the fourth paragraph, including the power to invest and reinvest the trust property, including income, in mortgages and other obligations secured on real estate and in the purchase and improvement of real estate, to sell and convey the trust property or any part thereof on their own terms, to lease any part or all of the property for a term beyond the possible termination of the trust or any lesser term, to borrow money on such terms as they may see fit, and to execute all necessary contracts. The trustees were directed in the fifth paragraph to distribute any excess funds among the beneficiaries annually or oftener, if convenient. There is a provision in the sixth paragraph that the trustees shall have no power to bind the beneficiaries or the trustees personally but each trustee shall be responsible only for his own willful default and breach of trust. Resignation and replacement of trustees are provided for in the seventh paragraph.

The surviving trustees are to appoint successors, and upon their failure to do so the beneficiaries shall have the right to appoint a new trustee or trustees. The trustees are authorized in the eighth paragraph to terminate the trust at any time by sale of the trust property and division of the proceeds, and at the expiration of the term of fifteen years the trustees are directed to terminate the trust in that way. The trustees may alter and add to the declaration of trust but may not extend it beyond fifteen years. They may convey the trust fund to a new or other trustee or trustees, or to a corporation if they deem that advisable.

18 Bernard Gilbert was the only witness. He testified that he, Coleman, and Levine had been interested in the apartments for about twenty years prior to 1926, and they intend to continue to rent them for quite a long time; prior to 1926 the property was handled mostly by Gilbert, assisted by Coleman and with some little help from Levine, who was an elderly gentleman; after the trust was formed there was no change in the method of handling the property, there was no change in the books; the trustees held no meetings and kept no records of their proceedings; no shares or certificates were issued; the purpose of forming the trust was to prevent the possibility of the property being partitioned after the death of one of the owners; the provision of the trust deed empowering the trustees to purchase other property and develop it was inserted to pro-

tect the holdings that the trust already had; that power has never been exercised; and aside from real estate, the only property held by the trustees was 300 shares of Shawmut Associates purchased at the suggestion of the Shawmut Bank which held a mortgage on one of the trust properties. Section 704 of the Revenue Act of 1928 does not apply in this case.

Five persons had been associated together for many years in the business of owning and operating a large number of apartment houses. In the latter part of 1926, just prior to the first taxable year involved herein, they chose for their own purposes to put their properties in a trust of which they would be the original trustees and beneficiaries. It is not important to make a comparison between the form of this trust and the usual form of a corporation. The five persons were in a position to make the trust one way or the other. The trust was not engaged primarily in preserving, settling, liquidating, or winding up the trust estate and it was not acting as a passive holder of property or as a mere conduit to carry over profits to those entitled to them.

These trustees, although they did not exercise all of the powers given to them in the trust instrument, were engaged, nevertheless, in carrying on a business for profit in much the same manner as the directors of a corporation are associated together for the purpose of carrying on a business enterprise. Judged by its activities,
19 rather than by its potentialities, this trust is an association within the meaning of the applicable revenue acts. Edward Leszcynski, Trustee, 29 B. T. A. 551; Joseph E. Swanson et al., Trustees, 29 B. T. A. 1123; Ittleson v. Anderson, 67 Fed. (2d) 323; United States v. Neal, 28 Fed. (2d) 1022, cert. denied 278 U. S. 659; White v. Hornblower, 27 Fed. (2d) 777; Little Four Oil & Gas Co. v. Llewellyn, 35 Fed. (2d) 149; Commissioner v. Atherton, 50 Fed. (2d) 740; Trust No. 5833, Security-First National Bank v. Welch, 54 Fed. (2d) 323; certiorari denied 286 U. S. 544; Commissioner v. Morriss Realty Co., 68 Fed. (2d) 648; Twin Bell Oil Syndicate v. Commissioner, Fed. (2d) (April 12, 1934). Cf. Dunbar v. Commissioner, 65 Fed. (2d) 447.

The petitioner argues in its brief that it has no legal existence; the declaration of trust and the transfer of the property by the individuals to themselves as trustees was an empty gesture; and since it is not a trust under the laws of Massachusetts, it is not an association within the meaning of the revenue acts and, therefore, cannot be taxed as a corporation. The five interested parties certainly tried to create a trust. The income in question was earned in the name of the trust. The petition in this case was filed by and in the name of the trust. The trust has presented its evidence and briefed its case. If no trust exists, then the Board has no jurisdiction in this proceeding. The trust cannot exist for one purpose and be nonexistent for another. The Commissioner has cited some authorities to show that

this petitioner is in fact and in law a trust. But regardless of what it is under the laws of Massachusetts, Congress has seen fit to tax it as a corporation. Cf. *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U. S. 110.

Decision will be entered for the respondent.

Reviewed by the Board.

SMITH dissents.

20 Before U. S. Board of Tax Appeals

Decision

Entered June 4, 1934

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered June 1, 1934, it is

Ordered and decided: That there are deficiencies of $10,975.78 and $9,327.66 for the years 1927 and 1928, respectively.

J. E. MURDOCK, *Member.*

Before U. S. Board of Tax Appeals

Petition of Coleman-Gilbert Associates for review by the Circuit Court of Appeals of the First Circuit of decision by the United States Board of Tax Appeals filed June 4, 1934

Filed August 30, 1934

The petitioner in this cause by Ralph E. Tibbetts, counsel, hereby files its petition for a review by the Circuit Court of Appeals of the First Circuit of the decision by the United States Board of Tax Appeals entered on June 4, 1934, determining deficiencies in the petitioner's Federal income taxes for the calendar years 1927 and 1928 in the respective amounts of $10,975.78 and $9,327.66, and respectfully shows:

I

That the petitioner is located at Boston in the Commonwealth of Massachusetts and filed its tax reports for the years in question with the Collector of Internal Revenue for the Boston district.

II

NATURE OF CONTROVERSY

The controversy involves the determination of the petitioner's liability for Federal income taxes for the calendar years 1927 and 1928. For the said years 1927 and 1928 the petitioner filed reports on Form

1941 showing the entire net income as distributable and taxable to five individuals named as beneficiaries. The Commissioner contends that the petitioner should have filed a return as an association taxable under the provisions of the Internal Revenue Acts applicable to the years involved. The controversy is limited to the question as to whether the petitioner is to be treated as an association subject to taxation as such, or whether on the other hand it is not subject to taxation as an entity.

21

III

The said Coleman-Gilbert Associates being aggrieved by the findings of fact and conclusions of law contained in said findings and opinion of the Board, and by its decision entered pursuant thereto, desires to obtain a review thereof by the Circuit Court of Appeals for the First Circuit.

IV

ASSIGNMENTS OF ERROR

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

1. The ruling of the Board that "it is not important" to make a comparison between the form of organization of the petitioner and the usual form of a corporation.

2. The finding of the Board that the trustees of the petitioner were engaged in carrying on a business for profit in much the same manner as the directors of a corporation are associated together for the purposes of carrying on a business enterprise.

3. The finding and ruling of the Board that the petitioner is an association within the meaning of the applicable Revenue Acts.

4. The ruling of the Board that the petitioner had no standing before the Board and the Board had no jurisdiction of the proceeding before it if the petitioner is, as it contends, neither a trust nor an association.

5. The ruling of the Board, that, irrespective of the status of the petitioner under the laws of Massachusetts, the petitioner is nevertheless taxable as a corporation under the enactments of Congress.

6. The finding of deficiencies for the years 1927 and 1928 in lieu of a determination that there is no income tax due from the petitioner for either of the years in controversy.

RALPH E. TIBBETTS,
Counsel for Petitioner,
10 Post Office Square, Boston, Mass.

22 [*Duly sworn to by Ralph E. Tibbetts; jurat omitted in printing.*]

Before U. S. Board of Tax Appeals

Statement of evidence

Filed September 27, 1934

The following is a statement of evidence submitted to the Board of Tax Appeals in the above-mentioned case:

The parties in the hearing before the Board stipulated the following facts:

The petitioner was created November 8, 1926, under an indenture of trust. A copy of this indenture is attached hereto and made a part hereof.

The creators of the trust, Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine, named themselves trustees of the petitioner and deeded certain land which they had held to the petitioner.

The property in question consisting of some twenty apartment houses in the city of Boston and its suburbs had originally been owned by Messrs. Gilbert, Coleman, and Levine, each owning a one-third interest, but subsequently Messrs. Coleman and Levine transferred one-half of their interest in this property to their wives, and, at the time of the petitioner's creation, Harry Coleman owned one-sixth interest in the property, Pauline Coleman one-sixth, Bernard Gilbert one-third, Harris Levine one-sixth, and Lena Levine one-sixth.

23 For the years 1927, 1928, and 1929 the petitioner filed returns with the Federal Government on Form 1041 reflecting the following incomes:

Year:	Income
1927	$81,302.11
1928	77,730.53
1929	23,376.23

The trust owns and operates some twenty apartment houses in the city of Boston and its environs. The gross annual rents of these apartment houses amount to approximately $420,000. There are approximately 1,500 tenants in the apartment houses altogether. The gross cost of the properties themselves is approximately $3,000,000. Employees' pay rolls total about $25,000 a year, the trustees draw no salary. The operating expenses run over $300,000 a year. An office force of three persons, besides the three operating trustees, is required to keep the necessary financial records of the trust. Two of the male trustees devote their entire time to the management and operation of the trust properties. A third trustee, Mr. Levine, is also actively engaged in taking care of a portion of the management duty.

There are no building managers or superintendents, the trustees doing all this work as part of their duties as trustees. They supervise the maintenance of the trust properties and see that they are kept in operating condition, collect the rents, order repairs, purchase supplies, arrange loan financing, borrow money when necessary, pay all expenses, supervise the office details involved in the operation of these properties, personally direct the work of all the personnel, secure new tenants, pacify old ones, in short, they devote their entire time, energy, and ability to the successful operation of the trust properties. The female trustees are entirely inactive in the management of the trust. No part of the management work, collection of income, etc., is performed by "agents", as that term is generally understood, except insofar as strictly supervised employees on a weekly salary might be considered agents.

Oral testimony was submitted by the petitioner by witness Bernard Gilbert, who testified that he was one of the trustees of the Coleman-Gilbert Associates; that he, together with Mr. Coleman and Mr. Levine, two of the other trustees, had been interested in the apartments which are now included, in the Coleman-Gilbert Asso-
24 ciates trust for about 20-odd years; that prior to 1926 the property had been operated under the name of Coleman & Gilbert and that the witness had been the most active in handling the property prior to the formation of Coleman-Gilbert Associates; that there was no change in the method of handling the properties after Coleman-Gilbert Associates was formed and no change in the books; that there were never any meetings of the trustees and no records of any proceedings of the trustees; that there were no shares or certificates of the trust issued at any time; that the purpose of forming Coleman-Gilbert Associates was to avoid a partition of the property by some of the heirs in case of the death of any of the owners of the property; that the reason the provision empowering the trustees to purchase other property was put in the trust instrument was simply to protect the holdings that the trust had; that the power had never been exercised; that the only securities the trust had were 300 shares of Shawmut Associates, a subsidiary of the National Shawmut Bank; that these securities were bought at the instance of the National Shawmut Bank which had a mortgage on the property of the trust, and suggested that the trust buy the shares in the Shawmut Associates; that these shares were left with the National Shawmut Bank after purchase.

On cross-examination by counsel for the Commissioner, the witness testified that there were times when the trust had to borrow substantial sums of money, which it endeavored to obtain at reasonable rates; that it was the endeavor of the trust to rent the apartment houses as profitably as possible with the idea of making a profit for the beneficiaries; that the employees of the trust comprising such as janitors, painters, carpenters, and the office employees involved ex-

penditures for salaries and wages of about $25,000 a year; that most of the tenants are without leases although some are on annual leases.

RALPH E. TIBBETTS,
Attorney for the Petitioner.

Assented to:
ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

25 Approved and ordered filed this twenty-seventh day of September 1934.

J. E. MURDOCK, *Member.*

Declaration of trust

[MEMORANDUM. The Declaration of Trust is here omitted as it is already printed at page 8. A. I. CHARRON, *Clerk.*]

Before U. S. Board of Tax Appeals

Praecipe for transcript of record

Filed October 8, 1934

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Court of Appeals for the First Circuit at Boston, Massachusetts, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition for redetermination.

(b) Answer of the respondent.

(3) The memorandum opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review, filed by the petitioner in the above cause.

(6) The statement of evidence.

(7) This Praecipe.

RALPH E. TIBBETTS,
Attorney for Petitioner.

26 [Clerk's Certificate to foregoing transcript omitted in printing.]

[MEMORANDUM. An order of enlargement of time for docketing case to, and including, November 15, 1934, is here omitted. A. I. CHARRON, *Clerk.*]

27 [Caption omitted.]

Before U. S. Board of Tax Appeals

Docket No. 62960

COLEMAN-GILBERT ASSOCIATES, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances

For Petitioner: Ralph E. Tibbetts, Esq., Henry H. Bond, Esq.
For Respondent: C. A. Ray, Esq.

Docket entries

Transferred to Mr. Murdock 12/8/33.

1932

Mar. 18—Petition received and filed. Taxpayer notified. (Fee paid.)
Mar. 18—Copy of petition served on General Counsel.
Apr. 13—Answer filed by General Counsel.
Apr. 21—Copy of answer served on taxpayer—General Calendar.

28 1933

Apr. 3—Hearing set May 3, 1933.
Apr. 14—Motion for circuit hearing at Boston filed by taxpayer. 4/28/33 granted.
Apr. 26—Notice of appearance of Henry H. Bond as counsel filed.
June 7—Hearing set for week of July 10, 1933, at Boston, Mass.
July 13—Hearing had before Mr. Smith, Division 5. Submitted. Stipulation of facts filed. Briefs due 60 days from date. Called 7/10/33.
Aug. 7—Transcript of hearing of July 13, 1933, filed.
Sept. 2—Brief filed by taxpayer.

1934

June 1—Memorandum opinion rendered—Mr. Murdock, Division 3. Decision will be entered for Commissioner.
June 4—Decision entered—Division 3, Mr. Murdock.
Aug. 30—Petition for review by U. S. Circuit Court of Appeals, 1st Circuit, with assignments of error filed by taxpayer.
Sept. 1—Proof of service filed by taxpayer.
Sept. 26—Agreed statement of evidence lodged.
Sept. 27—Agreed statement of evidence approved and ordered filed.
Oct. 8—Praecipe filed.
Oct. 8—Proof of service filed.
Oct. 27—Order enlarging time to Nov. 15, 1934, for transmission and delivery of record entered.

Before U. S. Board of Tax Appeals

Petition

Filed March 18, 1932

IT:AR:B-3 CEO-60D

The above petitioner hereby petitions for a redetermination of deficiency set forth by the Commissioner of Internal Revenue in his notice of final determination dated January 20, 1932, and as a basis of this proceeding alleges as follows:

(1) The petitioner, Coleman-Gilbert Associates, is a trust organized by law and having its principal place of business in Boston, Mass.

29 (2) Notice of deficiency, a copy of which is attached and marked "Exhibit A" was mailed to the petitioner on January 20, 1932.

(3) The tax in controversy is the income tax for the calendar year 1929, and the amount of the alleged deficiency is $2,241.39.

(4) The determination of taxes set forth in said notice of deficiency is based upon the following errors:

(a) Said deficiency is not due under a proper construction of the Revenue Act of 1928 and Regulations relative thereto.

(b) The Commissioner has erred in taxing your petitioner as an association under said act, your petitioner being, if it exists at all, a Massachusetts trust, so-called, and not taxable under said act.

(c) The Commissioner has erred in taxing your petitioner as an association under said act for the further reason that by the execution of the trust instrument hereinafter referred to and attached hereto as "Exhibit B", the legal and equitable interests in certain real estate were vested in the same persons, and said interests, under the laws of the Commonwealth of Massachusetts, thereupon merged, thereby depriving your petitioner of all title in and to the property, the income of which is alleged to be the income of your petitioner.

(5) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Prior to November 5, 1926, Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine were tenants-in-common of certain parcels of real estate located in the city of Boston. These properties were suitable for rental and were handled by the five individuals as a joint venture, being operated as a single unit in the nature of a partnership undertaking. The interest of Bernard Gilbert in the properties was two-sixths and that of each of the others above named was one-sixth.

(b) On November 5, 1926, the five individuals undertook to put the said properties into a trust by an instrument in writing, constituting themselves the "Coleman-Gilbert Associates", and taking legal title to such property into their own names as Trustees. Their respective beneficial interests in said properties remained as before,

and the so-called "trust" continued to conserve said properties, collect rents, and distribute the net proceeds in the same manner as before the formation of said trust, all net returns being divided among the trustees according to their respective beneficial interests, and the procedure of handling the properties after the formation of the trust was identical with that previously followed. The same books of account were kept continuously and the same character of entries made. None of the individuals before the formation of the trust or subsequent to it received any remuneration for services or were in any other way compensated other than to receive his or her respective share in the net proceeds.

(c) The trust instrument purported to limit the liability of the trustees to the trust property and by its terms precluded the possibility of any of the beneficial interests, who were also the trustees, from seeking a subdivision of the property under the provisions of the laws of the Commonwealth of Massachusetts, and it was for this purpose that the said trust was formed. No certificates of stock were issued to the beneficial owners. Certain provisions as to investment and reinvestment were inserted in the trust instrument as a precautionary measure, but were purely incidental and in aid of the conservation of the property originally put into the trust and as an aid to the liquidation of said property, and not with the idea and purpose of permitting the carrying on of a general real-estate business for speculative purposes or otherwise.

Wherefore your petitioner prays that this Board may hear the proceeding and determine that no deficiency exists for said year.

Respectfully submitted.

RALPH E. TIBBETTS,
Counsel for Petitioner,
10 Post Office Square, Boston, Mass.

Counsel signed in behalf of the majority of the trustees and in accordance with their wishes.

[*Duly sworn to by Bernard Gilbert, jurat omitted in printing.*]

NP–2–28

Exhibit A to petition

TREASURY DEPARTMENT,
Washington, Jan. 20, 1932.

COLEMAN AND GILBERT ASSOCIATES,
339 Huntington Avenue, Boston, Massachusetts.

SIRS: You are advised that the determination of your tax liability for the year 1929 discloses a deficiency of $2,241.39, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET, *Commissioner*,
By J. C. WILMER, *Deputy Commissioner*.

Enclosures: Statement, Form 882, Form 870.

32 STATEMENT

IT:AR:B-3 CEO-60D

In re: Coleman and Gilbert Associates, 339 Huntington Avenue, Boston, Massachusetts.

Tax liability

Year	Tax liability	Tax assessed	Deficiency
1929	$2,241.39	None	$2,241.39

Reference is made to the report of the internal-revenue agent in charge at Boston, Massachusetts, covering your income-tax liability for 1929 and to your protest filed under date of October 27, 1931.

The only point at issue is whether your organization is taxable as an association or whether the tax is to be paid by the beneficiaries upon their distributive share of the income accruing to you.

Under date of November 6, 1930, this office mailed you a deficiency notice with respect to your tax liability for 1927 and 1928, wherein it was held that your organization was taxable as an association. It appears that you have filed a petition with the United States Board of Tax Appeals contesting the decision of the Income Tax Unit. It is, therefore, deemed impracticable to afford you an opportunity to discuss your case in conference in this office, and accordingly this notice of deficiency is issued under the provisions of section 272 of the Revenue Act of 1928.

Net income reported on return	$23,376.23
Less: Credit	3,000.00
Taxable at 11%	20,376.23
Tax liability	2,241.39
Tax previously assessed	None
Deficiency in tax	2,241.39

Recital as to Exhibit B to petition

DECLARATION OF TRUST

[MEMORANDUM. The Declaration of Trust is here omitted, as it is already printed at page 8. A. I. CHARRON, *Clerk.*]

33 Before U. S. Board of Tax Appeals

Answer

Filed April 13, 1932

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(1) Admits the petitioner, Coleman-Gilbert Associates, has its principal place of business in Boston, Massachusetts, and denies remaining allegations contained in paragraph (1) of the petition.

(2) Admits the allegations contained in paragraph (2) of the petition.

(3) Admits the taxes in controversy are income taxes for the calendar year 1929, but denies that the amount in controversy is $2,241.39.

(4) Denies that the respondent erred in the manner alleged in paragraph (4) of the petition, subparagraphs (a) to (c), inclusive.

(5) Denies the material allegations of fact contained in subparagraphs (a) to (c), inclusive, of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore it is prayed that the Board redetermine the amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
C. A. RAY,
Special Attorney,
Bureau of Internal Revenue.

ike 4/11/32

34 *Recital as to memorandum opinion*

Entered June 1, 1934

[MEMORANDUM. The memorandum opinion is here omitted, as it is already printed at page 14. A. I. CHARRON, *Clerk.*]

Before U. S. Board of Tax Appeals

Decision

Entered June 4, 1934

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered June 1, 1934, it is

Ordered and decided: That there is a deficiency of $2,241.39 for the year 1929.

J. E. MURDOCK, *Member.*

Before U. S. Board of Tax Appeals

Petition of Coleman-Gilbert Associates for review by the Circuit Court of Appeals of the First Circuit of decision by the United States Board of Tax appeals filed June 4, 1934

Filed August 30, 1934

The petitioner in this cause, by Ralph E. Tibbetts, counsel, hereby files its petition for a review by the Circuit Court of Appeals of the First Circuit of the decision by the United States Board of Tax Appeals entered on June 4, 1934, determining deficiencies in the petitioner's Federal income tax for the calendar year 1929 in the amount of $2,241.39, and respectfully shows:

I

That the petitioner is located at Boston, in the Commonwealth of Massachusetts, and filed its tax report for the year in question with the Collector of Internal Revenue for the Boston District.

II

NATURE OF CONTROVERSY

The controversy involves the determination of the petitioner's liability for Federal income tax for the calendar year 1929. For
35 the said year 1929 the petitioner filed a report on Form 1041 showing the entire net income as distributable and taxable to five individuals named as beneficiaries. The Commissioner contends that the petitioner should have filed a return as an association taxable

under the provisions of the Internal Revenue Act applicable to the year involved. The controversy is limited to the question as to whether the petitioner is to be treated as an association subject to taxation as such or whether, on the other hand, it is not subject to taxation as an entity.

III

The said Coleman-Gilbert Associates, being aggrieved by the findings of fact and conclusions of law contained in said findings and opinion of the Board and by its decision entered pursuant thereto, desires to obtain a review thereof by the Circuit Court of Appeals for the First Circuit.

IV

ASSIGNMENTS OF ERROR

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

1. The ruling of the Board that "it is not important" to make a comparison between the form of organization of the petitioner and the usual form of a corporation.

2. The finding of the Board that the trustees of the petitioner were engaged in carrying on a business for profit in much the same manner as the directors of a corporation are associated together for the purposes of carrying on a business enterprise.

3. The finding and ruling of the Board that the petitioner is an association within the meaning of the applicable Revenue Act.

4. The ruling of the Board that the petitioner had no standing before the Board and the Board had no jurisdiction of the proceeding before it if the petitioner is, as it contends, neither a trust nor an association.

5. The ruling of the Board that, irrespective of the status of the petitioner under the laws of Massachusetts, the petitioner is nevertheless taxable as a corporation under the enactments of Congress.

36 6. The finding of deficiency for the year 1929 in lieu of a determination that there is no income tax due from the petitioner for the year in controversy.

RALPH E. TIBBETTS,
Counsel for Petitioner,
10 Post Office Square, Boston, Mass.

[*Duly sworn to by Ralph E. Tibbets; jurat omitted in printing.*]

Recital as to statement of evidence

Filed September 27, 1934

[MEMORANDUM. The Statement of Evidence with the Declaration of Trust attached thereto is here omitted as it is already printed at page 22. A. I. CHARRON, *Clerk.*]

Before U. S. Board of Tax Appeals

Praecipe for transcript of record

Filed October 8, 1934

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Court of Appeals for the First Circuit at Boston, Massachusetts, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as
37 required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Motion to file amended petition for redetermination (no record).

(b) Amended petition (no record).

(c) Respondent's answer to original petition.

(3) The memorandum opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review, filed by the petitioner in the above cause.

(6) The statement of evidence.

(7) This praecipe.

Ralph E. Tibbetts,
Attorney for Petitioner.

[Clerk's certificate to foregoing transcript omitted in printing.]

[Memorandum. An order or enlargement of time for docketing case to, and including, November 15, 1934, is here omitted. A. I. Charron, *Clerk.*]

38 In United States Court Court of Appeals, First Circuit

Minute entry

On January 4, 1935, these cases came on to be heard together, and were fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson, and Honorable James M. Morton, Jr., Circuit Judges, sitting.

39 In United States Circuit Court of Appeals for the First Circuit

No. 2975. October term, 1934

COLEMAN-GILBERT ASSOCIATES, PETITIONER FOR REVIEW

v.

COMMISSIONER OF INTERNAL REVENUE

No. 2976

SAME

v.

SAME

Appeals from Board of Tax Appeals

Before BINGHAM, WILSON, and MORTON, JJ.

Opinion of the court

Filed February 27, 1935

WILSON, *J:* These are petitions for review of decisions of the Board of Tax Appeals under secs. 1001–1003 of the 1926 Revenue Act as amended by sec. 603 of the 1928 act and sec. 1101 of the Revenue Act of 1932. The petition in #2975 involves income taxes for the years 1927 and 1928, and the petition in #2976 involves income taxes for the year 1929. The same question is involved in both cases and may be disposed of in one opinion.

The question to be determined is whether the trust known as Coleman-Gilbert Associates for the years in question is taxable as a corporation.

By a declaration of trust executed on November 8, 1926, Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine provided that certain real estate situated in the city of Boston and its suburbs should, for a period of fifteen years, be held by them in trust, under the name, Coleman-Gilbert Associates.

It is agreed by the parties hereto that the property in question, consisting of some twenty apartment houses in the city of Boston and its suburbs, had originally been owned by Messrs. Gilbert, Coleman, and Levine in common, each owning a one-third interest;
40 that prior to November 6, 1926, Coleman and Levine had each transferred one-half of his interest in this property to his wife, so that, at the time of the declaration of trust, Harry Coleman owned one-sixth interest in the property, his wife, Pauline Coleman, one-sixth; Harris Levine, one-sixth; his wife, Lena Levine, one-sixth; and Bernard Gilbert, one-third; that for the years 1927, 1928,

and 1929 the petitioner filed returns with the Federal Government as a fiduciary on form 1041 reflecting the following incomes: For the year 1927, $81,302.11; for the year 1928, $77,730.53; and for the year 1929, $23,376.23, each beneficiary in each year filing a return for his or her share of the income distributed under the trust agreement.

It is further agreed that altogether there are about 1,500 tenants in the apartment houses, and the gross annual rentals amount to approximately $420,000; that the operating expenses are over $300,000 a year; that two of the male trustees devote their entire time to the management and operation of the trust properties, and a third trustee, Mr. Levine, is also actively engaged in taking care of a part of the management duties, but so far the female trustees have been entirely inactive in the management of the trust property; that the trustees draw no salary; that the male trustees have superintended the maintenance of the trust properties, including the collection of the rents, the making of repairs, the purchasing of supplies, the borrowing of money when necessary, the paying of all bills, and supervising the office details involved in the operation of these properties; that no part of the management work, collection of income, has been performed by "agents" as the term is generally understood, except insofar as strictly supervised employees on a weekly salary might be considered agents. The only other property in the trust estate are 300 shares of the Shawmut Associates, a subsidiary of the National Shawmut Bank, which were bought at the instance of the National Shawmut Bank, which has a mortgage on the property of the trust.

Bernard Gilbert testified before the Board without contradiction that, for more than twenty years, he, together with Mr. Coleman and Mr. Levine, had been interested in this real estate, which is now included in the Coleman-Gilbert Associates trust; that prior to 1926 the property had been operated under the name of Coleman & Gilbert, and that he had been the most active of the coowners in the handling of the property prior to the formation of the Coleman-Gilbert Associates; that there was no change in the method of handling the properties after Coleman-Gilbert Associates was formed, except as hereafter appears, and no change in the books; that there were never any meetings of the trustees, and no records of their proceedings kept; that there were no shares or certificates of the trust issued at any time; and of course no meetings of shareholders as such were ever held; that the purpose of forming Coleman-Gilbert Associates was to avoid a partition of the property by some of the heirs in case of the death of any of the owners of the property, and, in any event, was to terminate in fifteen years; that the power to purchase
41 other property was inserted in the trust instrument simply to protect the holdings that the trust had; but this power and certain other broad powers vested in the trustees had never been exercised.

Congress has not undertaken to lay down any tests for determining whether an organization is an association within the meaning of sec. 2 (a) (2) of the Revenue Act of 1926 and sec. 701 (a) (2) of

the Revenue Act of 1928, and taxable as a corporation. It has merely said by way of definition that corporations "include associations, joint-stock companies, and insurance companies."

It was left for the courts or the Treasury Department by regulations to determine what organizations are included within the term "associations." As yet the Supreme Court has not laid down any absolute test. Two cases only have come before it in which the taxing of trusts as associations was involved: Crocker et al., Trustees, v. Malley, 249 U. S. 223; Hecht et al., Trustees, v. Malley, 265 U. S. 144.

In the former case, decided in 1919, the court in deciding that the trust was not an association, laid stress on two points: (1) That the purpose of the trust was to liquidate a business, and (2) that the beneficiaries had no control over the trustees.

In the case of Hecht et al., Trustees, v. Malley, the court said, p. 157:

"The word 'association' appears to be used in the act in its ordinary meaning. It has been defined as a term 'used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.' 1 Abb. Law Dict. 101 (1879); 1 Bouv. Law Dict. (Rawle's 3rd Rev.) 269; 3 Am. & Eng. Enc. Law (2d ed.) 162; and Allen v. Stevens (App. Div.), 54 N. Y. S. 8, 23, in which this definition was cited with approval as being in accord with the common understanding. Other definitions are: 'In the United States, as distinguished from a corporation, a body of persons organized, for the prosecution of some purpose, without a charter, but having the general form and mode of procedure of a corporation.'"

In the same case the court said, p. 161:

"It results that Crocker v. Malley is not an authority for the broad proposition that under an act imposing an excise tax upon the privilege of carrying on a business, a Massachusetts trust engaged in the carrying on of business in a quasi-corporate form, in which the trustees have similar or greater powers than the directors in a corporation, is not an 'association' within the meaning of its provisions.

"We conclude, therefore, that when the nature of the three trusts here involved is considered, as the petitioners are not merely trustees for collecting funds and paying them over, but are associated together in much the same manner as the directors in a corporation for the purpose of carrying on business enterprises, the trusts are to be deemed associations within the meaning of the act of 1918."

This appears to be the last word of the Supreme Court that is helpful in determining what is included in the term "association."

42 The Treasury Department has endeavored from time to time to clarify the situation by regulations defining associations and trusts. Under art. 1504 of Regulation 62, it followed what it understood was the holding of the court in Crocker v. Malley, supra, and provided that—

"where trustees hold real estate subject to a lease and collect the rents, doing no business other than distributing the income less taxes and similar expenses to the holders of their receipt certificates, who have no control except the right of filling a vacancy among trustees and of consenting to a modification of the terms of the trust, no association exists. * * * If, however, the cestuis qui trust have a voice in the conduct of the business of the trust, whether through the right periodically to elect trustees or otherwise, the trust is an association. * * *"

In 1926, following the decision in the Hecht v. Malley case, by Regulation 69, arts. 1502 and 1504, and again in 1928 by Regulations 74, arts. 1312 and 1314, it was provided that, in addition to the above tests in Regulation 62, "if, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists. * * * Even in the absence of control by the beneficiaries where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors of a corporation for the purpose of carrying some business enterprise, the trust is an association within the meaning of the statute."

There are numerous decisions of the Board of Tax Appeals and Circuit Courts of Appeals in review, without laying down any definite line of demarkation between an association and a pure trust. In some instances the courts have based their decisions on the rule that where the administrative board has construed an ambiguous or indefinite definition in a statute and no change was made in a later act of Congress, it is presumed that Congress had adopted the definition adopted by the administrative board; in other cases the courts have been influenced by other considerations: the limited activities of the trustees, and the purpose of the trust. In any event, the decisions are seemingly in a hopeless state of confusion. Kleines Federal Income Taxation, p. 1138, para. 34:9, and 1933 Suppl., para. 34:9. As the regulations of the Treasury Department have been modified from time to time, it may well be questioned whether Congress has intentionally adopted every modification of the regulations when it makes no change in the language of its acts; or whether it has left it for further construction by the courts, especially if the regulations have not followed closely the language of the courts. Tyson et al. v. Commissioner, 68 Fed. (2d) 584; Trust No. 5833, Security-First Nat. Bank of Los Angeles v. Welch, 54 Fed. (2d) 323, 326.

It would serve no useful purpose to attempt to analyze all the cases that have been decided by the Board of Tax Appeals and the Circuit Courts of Appeals involving this question. The lack
43 of a conclusive test will sufficiently appear in the following cases in which the Board of Tax Appeals has been sustained in holding a trust was an association: Willis et al. v. Commissioner, 58

Fed. (2d) 121; Smith v. Commissioner, 69 Fed. (2d) 911; Little Four Oil & Gas Co. v. Llewellyn, 35 Fed. (2d) 149; Trust No. 5833, Security-First Nat. Bank of Los Angeles v. Welch, supra; Sloan et al. v. Commissioner, 63 Fed. (2d) 667; Investment Trust of Mutual Investment Co., Empire Trust Co., Trustee, v. Commissioner, 71 Fed. (2d) 1009; and in the following cases in which the court has either reversed the Board in holding that the trust was an association or has approved the Board's finding that the trust was not an association, Lansdowne Realty Trust v. Commissioner, 50 Fed. (2d) 56; Lucas, Commissioner, v. Extension Oil Co., 47 Fed. (2d) 65; Commissioner v. Morriss Realty Co. Trust, 68 Fed. (2d) 648; Commissioner v. Pryor & Lockhart Development Co., 70 Fed. (2d) 154, 158; Commissioner v. Kelley et al., Trustees (decided Dec. 4, 1934 (C. C. A.)).

From the decisions of the Board of Tax Appeals and the several Circuit Courts of Appeals, it is impossible to mark out any definite pathway to follow in every case. The only conclusion is that each case must depend on its own state of facts.

We think, however, it is generally agreed that, in order for a trust to be taxed as a corporation, the trustees must not only be carrying on a business enterprise for profit but must be doing it in much the same manner and form as directors of a corporation. One other factor also seems to be agreed upon: that it is not what the trustees are authorized to do under the trust instrument but what they actually are doing. Gardiner v. United States, 49 Fed. (2d) 992; Commissioner v. Pryor & Lockhart Development Co., supra.

It also appears that the purpose for which the trust was formed is given weight in determining the nature of the organization. Was it organized solely for the purpose of conducting a business for profit, or merely to collect and distribute income and eventually liquidate the corpus of the trust, Willis et al. v. Commissioner, 58 Fed. (2d) 121, 122; Commissioner v. Atherton et al., 50 Fed. (2d) 740; or is it a trust under which the conduct of a business for the benefit of the cestuis qui trustent is incidental to the purpose for which it was created, as in Commissioner v. Kelley et al., supra?

It was held in Commissioner v. Pryor & Lockhart Development Co., supra:

"Where an entity of this kind resembles a corporation in some respects and that of a partnership in others—that frequently being the case—the features of similarity should be compared and the marks of dissimilarity contrasted. The resemblances should be balanced. It should be determined by that method the one to which the enterprise is predominantly akin in the method, mode, and form of procedure in the conduct of its business. If it be a corporation, it falls within that category; if a partnership, it should be placed in that class and should be taxed accordingly. Tyson v. Commissioner, supra. In Lucas, Commissioner, v. Extension Oil Co.
44 (C. C. A.), 47 F. (2d) 65, 67, involving facts similar to those presented here, the court declared the applicable doctrine as follows:

"'The Board of Tax Appeals in a careful opinion, balancing the resemblances which petitioner in its structure more to a trust against those which it bore to a corporation, and considering also the facts as to what the petitioner actually did, found as a fact and concluded as a matter of law that petitioner was not an association within the meaning of the taxing act, "voluntarily organized to transact business under corporate forms and transacting such business".'"

It is true that the Board of Tax Appeals found as facts that, while the trustees in the instant cases did not exercise all the powers given them in the trust instrument, they were, nevertheless, carrying on a business for profit in much the same manner as directors of a corporation are associated together with the purpose of carrying on a business enterprise; and upon these facts, judged by their activities, the Coleman-Gilbert Associates was an association within the meaning of sec. 2 (2) (a) (2) of the 1926 act and 701 (a) (2) of the 1928 act.

The three active members of the trustees were undoubtedly conducting the management of the trust property with a view to ensuring an income for the beneficiaries of the trust, who were the equitable if not the legal owners of the res; but it does not appear that they exercised any powers that they were not bound to exercise by reason of their ordinary duties as trustees in preserving the properties under a pure trust, viz: keeping them in repair, renting them to the best advantage, and collecting the rentals, and paying operating expenses. In other words, they did nothing that they were not bound to do in their capacity as trustees, if the trust was what may be termed a pure trust, in which the trustees were expressly authorized to borrow money, if necessary, for carrying out the purpose of the trust.

From the activities of the trustees alone we do not think the Board was warranted in holding as a matter of law that the trust was an association. While there may have been sufficient evidence to warrant the Board in finding that they were conducting a business enterprise, and with the purpose of ensuring an income for the beneficiaries during the continuance of the trust, and while they may have exercised powers in some respects as great as those of the directors of a corporation, they did not exercise them in the manner of directors of a corporation. They held no meetings; they kept no records; their acts were not determined by a majority vote. Their tenure as trustees was during life or the duration of the trust, unless they voluntarily resigned. Two trustees were wholly inactive, and a third only active in part in the management. They conducted the business in the same manner that it had been conducted before the trust was formed.

In a case not clearly falling on one side or the other of the line between an association and a trust, we think the Board in comparing the resemblance of a trust to a corporation should give due weight to the purpose for which the trust was organized. The uncontradicted evidence in these cases discloses, we think, that the Coleman-Gilbert Association was not organized to conduct

a business for profit; that while the trustees did manage the property so that it produced an income for the beneficiaries, it was only incidental to the main purpose for which the trust was created. The purpose of the creators, according to the uncontradicted evidence, was to prevent a partition and division of the property in case one of the owners died within a definite period of time. It was deemed in the interest of the coowners and their heirs that the properties should be kept intact for a period of fifteen years. There is no evidence to warrant any inference that it was organized in order that it might be better managed, or that any additional financial advantage would accrue from creating a trust. If every trust terminating in five, ten, or fifteen years in which the trust res consisted of rentable real estate is managed faithfully and prudently by the trustees with a view to producing the largest income for the cestuis qui trustent is to be taxed as an association, few strictly pure trusts would escape a double taxation upon its income.

The imposition of a double tax upon the income of a trust, viz: a tax, first, on the income of the trust as an entity, and a further tax upon the distributive shares of the beneficiaries should clearly be warranted under the acts of Congress, and should not have as its basis some remote resemblance to a corporation. If there is doubt, it should be resolved in favor of the taxpayer. Crocker v. Malley, supra, p. 233; Hecht v. Malley, p. 160. To warrant a tax as a corporation, we think that not only should the trustees be actively conducting a business chiefly for profit and in the form and manner of directors of a corporation, but where there is doubt, it should not be determined wholly by a resemblance in form, but the nature and purpose of the trust agreement should be considered in determining whether a trust is an association within the intent of Congress. Congress evidently sought to prevent trusts similar to those known as Massachusetts Trusts, which may be organized for the sole purpose of conducting a business for profit, and have many of the features of a corporation, from avoiding the capital stock tax and corporation income taxes; but we do not think the purpose of Congress in defining a corporation as including associations was to impose a double tax on the income of a trust of limited duration, organized not for the conduct of a business for profit, but to keep the trust res intact in the respective families of the trustees during the period of the trust instrument, the trust property formerly having been owned by the trustees as cotenants, especially when no change in its management results from that when owned as cotenants.

There is no evidence in this case that the trustees in their management, even if they had the necessary powers, departed from the purpose for which the trust was organized. The conclusion which the Board drew from the stipulated facts and the uncontradicted evidence that Coleman-Gilbert Associates was an association within the

meaning of the Revenue Acts of 1926 and 1928, we think, was error.

46 The decisions of the Board of Tax Appeals are reversed, and the cases are remanded to that Board for further proceedings not inconsistent with this opinion.

On the same date, to wit, February 27, 1935, the following final decree was entered in each case:

In United States Circuit Court of Appeals

Final decree

February 27, 1935

This cause came on to be heard January 4, 1935, upon the record upon petition for review of the United States Board of Tax Appeals, and was argued by counsel.

Upon consideration whereof, it is now, to wit, February 27, 1935, here ordered, adjudged, and decreed as follows: The decision of the Board of Tax Appeals is reversed, and the case is remanded to that Board for further proceedings not inconsistent with the opinion passed down this day.

By the Court:

ARTHUR I. CHARRON, *Clerk.*

Recital as to issuance of mandate

Thereafter, to wit, on March 30, 1935, mandate issued to the Board of Tax Appeals.

[Clerk's certificate to foregoing transcript omitted in printing.]

47 Supreme Court of the United States

No. 78. October Term, 1935

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

48 Supreme Court of the United States

No. 79. October Term, 1935

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File Nos. 39631, 39632. U. S. Circuit Court of Appeals, First Circuit. Term No. 78. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Coleman-Gilbert Associates. Term No. 79 Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Coleman-Gilbert Associates. Petition for writs of certiorari and exhibit thereto. Filed May 27, 1935. File Nos. 78 O. T. 1935, 79 O. T. 1935.